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No. 91-583

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1991

HUGH H. BOSWORTH, JR., WALTER HENNINGSEN, MELISSA HENNINGSEN, IRENE E.SCOTT and HENNINGSENS, INCORPORATED, on behalf of themselves and all other similarly situated taxpayers,
PETITIONERS

v.

TIMOTHY J. LEATHERS, Commissioner of Revenues; et. al. PULASKI COUNTY, ARKANSAS; and the CITY OF FAYETTEVILLE, ARKANSAS; and all other similarly situated counties and cities; and AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.; MCI TELECOMMUNICATIONS CORPORATION; U.S. SPRINT COMMUNICATIONS COMPANY; TMC OF ARKANSAS, INCORPORATED; LDDS OF ARKANSAS INCORPORATED; COMPUTE-A-CALL OF CENTRAL ARKANSAS, INCORPORATED, and all other similarly situated providers of long distance interstate and international telephone and telecommunications services,
RESPONDENTS

ARKANSAS TELEPHONE ASSOCIATION, INC.
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION BY RESPONDENT LDDS OF ARKANSAS INCORPORATED

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PARAGON PRINTING & STATIONERY COMPANY, INC.

RULE 29.1 STATEMENT

LDDS of Arkansas, Incorporated (LDDS) is a regulated long distance telephone carrier, which corporation is organized and exists under the laws of the State of Mississippi with its headquarters and commercial domicile located at Jackson, Mississippi. LDDS is qualified, as a foreign corporation, to conduct business in the State of Arkansas. LDDS is a regulated interexchange carrier providing both intrastate and interstate long distance telephone and telecommunications services in the State of Arkansas.

LDDS has no subsidiary corporations and it is a wholly owned subsidiary of LDDS Communications Corporation, a Mississippi corporation with its headquarters and commercial domicile located at Jackson, Mississippi.

In 1989, LDDS acquired all of the assets of TMC of Arkansas, Inc. (TMC), and the interexchange intrastate and interstate telephone business previously conducted by TMC in Arkansas has thereafter been merged with that of LDDS.

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STATEMENT OF THE CASE

LDDS accepts the Statement of the Case as set forth in the Petition for Writ of Certiorari filed herein. However, with regard to the issue of the competitive pricing disadvantage at which the questioned sales tax statute places the nonfacility based interexchange carriers, LDDS wishes to supply the following additional information to supplement the Petitioners' Statement of the Case:

The language that the Arkansas General Assembly chose to use in Ark. Code Ann. § 26-52-301(3)(A)(iv)(c) to define the terms "interstate-wide area telecommunications

service or other similar services" (which telephone services are excluded for the sales tax base) is very ambiguous and has presented all long distance interexchange carriers with a problem of how to fairly administer this tax law. This problem has increased because of the ever evolving nature of the types of long distance interstate telephone services offered in Arkansas. In this regard, the then General Manager of TMC of Arkansas testified in this case (R. 236-239) that --

> Q (Mr. Sayre) I have placed in front of you a copy of the current statute that imposes the tax, Arkansas Code 26-52-306 (sic. 301) and the subsection 3(A) is the provision that applies the tax to telephone services. And, in particular, I draw your attention to the provisions which contain the exclusions in subpart (iv) and ask if you have examined those in making your determination of the types of services you have to apply the tax....to apply the tax to the types of services that TMC supplies?
>
> A (Mr. Carpenter) Again, I did not have this document at the time I made the decision as to what I would apply it to. Subsequently, I have reviewed this and, frankly, I have some difficulty with the definitions.
>
> Q Well, would you tell the Court what the problem is with the definitions?
>
> A Well, items (a) and (b) are fairly clear as they relate to private services, and we discussed that earlier. Item (c) attempted to describe the services that would be excluded. It says, "Any interstate wide area telecommunication service." Now, wide area telecommunication service is not capitalized,

it doesn't carry a trademark or any notation after that to indicate that we're talking about any specific product. And then it follows: "...or other similar services which entitles the subscriber to make or receive an unlimited number of communications to or from persons having telecommunication service in a specific area which is outside the state in which the station providing the service is located." Now, interpretation of that can be extremely broad. First of all, interstate wide area telecommunication service suggests WATS services, but it doesn't say that specifically. It says, a service where a customer is entitled to make or receive an unlimited number of communications. Well, to the best of my knowledge, none of the communication services set a limit on the number of transactions that you can make within a period of time.

Q With regard to that, some local exchanges you can buy a certain number of phone calls per month or per week, that type of situation. But the regular long distance service, the MTS service, does not make any restriction on the number of calls you can make, does it?

A Again, AT&T's DDD or MTS product, their basic service, our basic service, MCI's and Sprint's, to the best of my knowledge, have no limitation on the number of communications that a customer can make. In fact, we encourage them to make as many as possible, that's our business. And so, again, there is not....there is a suggestion or an inference, but someone could possibly make the interpretation when they say an unlimited number that it means an unlimited number for X

amount. But, as I said earlier, no one charges a base amount for up to this many calls. There are some new product out, primarily offered by AT&T in the residential market, that do have so many calls per month for a flat fee. But back to the reading of this, "...make or receive an unlimited number of communications to or from persons within a specific area..." I kind of modified that a little bit. It doesn't say what specific area, so a specific area could be the United States. Again, the suggestion might have been that they were talking about within a WATS band, but a specific area, again, our services within a specific area is the United States, Puerto Rico and the Virgin Islands. Traditional WATS service on a banded basis, you could call within the specific area that you had ordered service for and that was primarily on a line-by-line or bill-by-bill basis. Most of the new virtual services make that determination on a call-by-call basis, such as that if you call on one band on one call, you're charged the banded rate for that call, and if you call another band on the next call then you're charged the rate for that band. And that's where the term "virtual banded" came from. But, again, the exclusion for interstate wide area telecommunication services or other similar services essentially describes every type of service there is. And, in fact, probably describes basic service. So I'm not sure we should be charging tax even on basic service.

In addition, the Arkansas Revenue Division has never published any clarifying or interpretive regulations or guidelines for the long distance interexchange carriers to use in imposing these taxes upon the various types of interstate

long distance services that they offer to their customer-subscribers. (R. 228, 607) Due to the ever evolving technological changes that occur in the types of interstate telephone services offered by interexchange carriers and the ever changing rate structures authorized by the FCC and the Arkansas PSC, there exists a real problem for such long distance carriers to make sure that they are collecting the correct amount of sales taxes from their subscribers, while not imposing these sales taxes upon charges for their long distance interstate services that are similarly priced to their competitor's interstate telephone services.

Therefore, besides the discriminatory pricing differential on such carrier's basic MTS services (which basic services may be competitively priced with a facility based interexchange carrier's WATS and WATS-like services) that results from the classification made by the taxing statute, all interexchange carriers face a serious problem of trying, in good faith, to comply with the provisions of the 1987 amendment to Arkansas' sales tax law. Each interexchange carrier must interpret an ambiguous statute in trying to apply the sales taxes only to charges for those services that are intended to be taxed, out of the many different types of long distance interstate telephone services that are now offered by interexchange carriers to their Arkansas subscriber-customers.

In effect, each interexchange carrier is left to its own devices to try and comply with the provisions of the Arkansas sales tax law.

LDDS' RESPONSE TO THE PETITION

LDDS, as a nonfacility based interexchange carrier, does not object to the Court's granting of the Petition for a Writ of Certiorari to the Arkansas Supreme Court requested by the Petitioners. The first question presented by the Petitioners involving the Equal Protection Clause of the Fourteenth Amendment, addresses, in part, the practical discriminatory pricing situation that arises for all nonfacility based carriers, due solely to the provisions of the 1987 amendment to Arkansas' sales tax law.

LDDS agrees that the rationale of the decision and the statement of, and utilization of, the rational basis test by the Wisconsin Supreme Court in the case of *GTE Communications Corporation v. Wisconsin Bell, Inc.*, 454 N.W.2d 797 (Wis., 1990) appear to be in direct conflict with the decision of the Arkansas Supreme Court in this case. Therefore, there appears to be a direct conflict between the decisions of the highest courts of these two states on how the Equal Protection Clause of the Fourteenth Amendment is to be applied in situations where charges for similar telephone services are taxed differently by the same general sales tax.

Accordingly, LDDS, as a nonfacility based interexchange carrier, has no objection to this Court's granting of the Petition for Certiorari filed in this case by the Petitioners. LDDS believes that a decision by this Court on the Equal Protection question presented by the Petitioners will be of benefit to all long distance telephone companies and their subscribers in the administration of state sales tax laws that are not applied evenly to charges for all types of long distance interstate telephone services.

CONCLUSION

For the above-mentioned reasons, LDDS states it has no objection to this Court's granting of the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

OCTOBER 30, 1991

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